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Brief of Hughes for P. in Error

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The Supreme Court

OF THE

UNITED STATES.

October Term, 1899.

W. H. BLACKBURN,
Plaintiff in Error.

v.

THE PORTLAND GOLD MINING COMPANY AND W. S. STRATTON,
Defendants in Error.

BRIEF OF THE PLAINTIFF IN ERROR IN REPLY.

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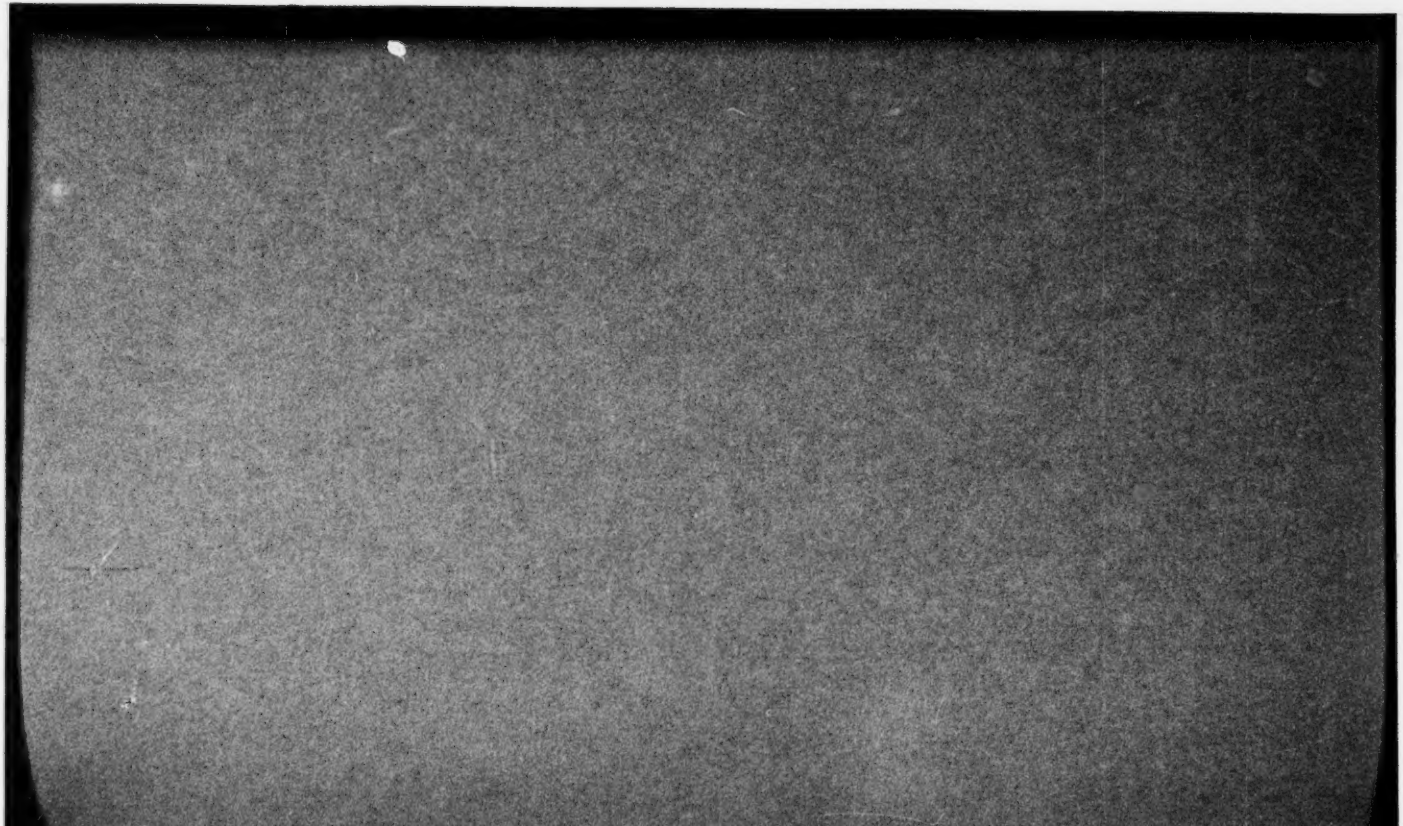

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BRIEF OF THE PLAINTIFF IN ERROR IN REPLY.

We have cited in our original brief herein a long list of authorities, showing that one of the defendants below, W. S. Stratton, having parted with title before he made his "application for patent," so that thereafter all proceedings were necessarily for the benefit and use of his grantee, The Port-

land Gold Mining Company, he was not a real party in interest, and, while his name was being used, nevertheless, it appearing, and the complaint so alleging, that The Portland Gold Mining Company was the party in interest, it alone was a real party to the controversy, and therefore, the party whose citizenship affected the question of jurisdiction.

A complaint is insinuated that the opinion of the court below in this case is not in the record. Its absence is due to the fact that the court below declined to file an opinion or to permit one to go upon the record. This position of the Court, and no delinquency on the part of the plaintiff in error prevents this Court having the benefit of all that was contained in that opinion.

It is a well settled proposition, which needs no extended citation of authorities in its support that, where an application for patent is made by one who grants away the title upon which that application is based, all title which comes to the applicant inures to the benefit of his grantee. In Colorado a quit-claim deed has been held sufficient to convey all present and after-acquired title, all legal and equitable rights.

Bradbury v. Davis, 5 Colo., 265.

When if at all the deed from Stratton to the defendant company was recorded, when knowledge of it existence was acquired, are not disclosed by the complaint. The complaint does disclose, however, that at the time of making the application for patent, which is one of the steps in the proceed-

ings taken in the Land Office, to secure a patent from the government, the defendant Stratton had parted with all title to the claim sought to be patented. An examination of the federal statutes which are quoted in extenso in the briefs of the plaintiff in error and defendant in error, heretofore filed herein, with regard to the patenting of lode mining claims, will show that the application for patent is not the first step in the proceeding, but one of the later ones, coming after the survey has been ordered and approved and the matter sent to the local Land Office for further proceedings there.

Morrison's Mining Rights (9th ed). Title, "Application for Patent," pp. 345–361.

Lindley on Mines, Vol. 2, Chapter 3, Secs. 677, 678, 680, 690, 691, 695.

Hence, if the proceeding had been permitted to go forward in Stratton's name, notwithstanding he had conveyed away the title, the result would have been a patent for the use and benefit of the defendant The Portland Gold Mining Company, which would have required no deed from Stratton thereafter in order to vest the title in it.

Elwood v. Flannigan, 104 U. S., 562.

From which it seems clear, that by the conduct of these defendants, a situation had arisen which made it unsafe to omit either as a defendant in the litigation, and yet, on the allegations of the facts, which are conceded for the purposes of this argument to be true, made Stratton a party who had no such interest as would affect the jurisdiction on account of his citizenship.

II.

The amount involved is alleged to exceed the sum or value of two thousand dollars. This is an allegation of fact, not a conclusion of law. The subsequent allegation of one thousand dollars damage in the detention of the property and three hundred dollars of expenditures does not destroy the effect of or antagonize or narrow the precedent allegation. The litigation is for the purpose of determining who is entitled to a patent—which is the absolute title—as well as the possession and enjoyment of the portion of the mining claims in conflict. Under the practice prevailing in Colorado, the adverse suit authorized by the federal statute is assimilated to the code suit for the purpose of securing possession of specific real estate, which code form of action has taken the place of the common law action of ejectment. If the plaintiff or defendant in this adverse litigation is successful, the land department will thereupon deliver a patent to the successful litigant. This litigation absolutely determines the respective rights of the parties to the property in dispute. Its entire value, all the title which can possibly be obtained, are involved and will be determined. Under the code a recovery of certain damages is permitted to be coupled with a determination that the litigant is entitled, not only to the possession of the property, but, so far as the Court can settle that matter, to a patent from the United States. The federal statute having authorized a determination of this controversy

in a court of competent jurisdiction, and having provided the force and effect which shall thereto be given, it follows necessarily that it is the value of the property, not the price which the government receives therefor, and not the mere possession, which is involved and fixes the amount or value in controversy. While some technical carping may be indulged in because the complaint did not allege the *matter*, instead of the *amount* in dispute, the meaning of the allegation is clear; it can not be misapprehended; and it is borne out by the complaint, in saying that the value of the property, as well as the damages claimed, were united in the allegation that the amount in dispute exceeded the sum or value of two thousand dollars. The allegation having been made that the amount in dispute exceeded two thousand dollars, and having been followed by a specific allegation of certain damages, which were less than two thousand dollars, it follows quite logically, we apprehend, that the remainder of the value, which when added to these specifications, exceeded two thousand dollars, is to be found in the value of the mining claim itself. The price paid to the government for the land has never been taken to be the actual value of the property. The same price is paid to the government per acre for the richest bonanza bearing lodes as for those in which the values are problematical and exist largely in the hope and imagination of the anxious miner. It is because the claim is worth much more than five dollars an acre that a patent is sought and a controversy arises.

There are no decisions holding that the form of allegation employed in this complaint is a mere conclusion of law or insufficient as a compliance with the spirit and purpose and all the requirements of the statute. The overrefined criticism made upon the use of the word "amount" as contrasted with the word "matter" has no foundation in substance. There can be no misapprehension of the meaning of the complaint. The amount in this instance means the sum of the values which are the subject of litigation, which are in contention between the parties, and which will be affected by the litigation. In the present instance, the entire value of the territory in dispute in the adverse was involved in the controversy, as well as the thirteen hundred dollars of damage alleged.

In Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. (45 Fed. Rep., 545), the Court held that, for the purpose of determining the jurisdictional amount in a bill to quiet title, the whole value of the property, the possession or enjoyment of which is threatened by defendant, is the measure of the value of the matters in controversy, the Court saying, upon this subject:

"Without stopping now to invoke, in answer to this objection, the effect of a demurrer to the well-pleaded averment of a jurisdictional fact, it is sufficient to say that I think the proper criterion of the 'value of the matters involved in the controversy,' is to be found in the value of the property, the possession or enjoyment of which will be affected by the result of the litigation. For the purposes of this suit I should not hesitate to hold that the whole value of the property, the possession and enjoyment of which is imperiled by the threatening acts of the defendant, is the

measure of the value of the matters put in controversy by it. If any other test than this should be substituted, very many suitors would be debarred from seeking the protection of the federal courts, and those tribunals would be stripped of a very important branch of their hitherto acknowledged jurisdiction, especially upon their equity side. What would become of suits for the reformation of a written agreement, for the cancellation of alleged forged or fraudulent deeds, for the specific performance of contracts to convey lands, and many others of like character, if, upon the question of jurisdictional value of the matters in controversy, the courts were limited to the pecuniary value of the deed, the contract, the agreement as such, and were barred from considering the value of the thing affected by, or the subject-matter of, those various writings. Take, for instance, the case of a forged deed of conveyance. Suits to compel the surrender and cancellation of such dangerous documents are not nncommon in the federal courts. But on what principle can jurisdiction be maintained if the question of the 'value of the matters in controversy' be raised? What is the value of a 'forged deed?' Simply nothing. If it be forged, it is absolutely valueless; but, for jurisdictional purposes, it must be held to have, to the rightful owner of the premises pretended to be conveyed by it, the whole value of the premises themselves, the possession and enjoyment of which are menaced and put in peril by its existence. The application of this test to the case at bar is obvious. It may, indeed, be true that the claims of the defendant to the property in possession of the complainant are groundless; it may be held that the deeds, leases, agreements, and adjudications of the courts, upon which and from which the complainant base and claim its right, are invulnerable to any attack which, in pursuance of its threats, the defendant may make. That will appear at the end of the litigation, but the 'matter in controversy' is not the result of the litigation, but the property which will be affected by that result, and its value is the value which does or does not confer jurisdiction as it may be summed up."

In the case of Kenady v. Edwards, 134 U. S., 117, Mr. Justice Harlan, in rendering the opinion, said:

"The appellees have moved to dismiss each of these appeals upon the ground that the value of the matter in dispute is not

sufficient to give the court jurisdiction; and with the motions to dismiss was joined a motion to affirm the decree as to each appellant. Both motions to dismiss are overruled. As to Kenady, the decree denies his right to property of which he claims to be the owner, and which is of the value of eleven thousand dollars. He paid that sum, in cash, to Green, as trustee. It is true that there are funds in the registry of the court below, which, in the event of the affirmance of the decree, can be paid over to him, and he be thus far reimbursed for what he paid to Green on the purchase of the property. *But we think that the value of the specific property which is in litigation must determine the jurisdiction of this court.*"

That the amount in the controversy was not limited to the thirteen hundred dollars is clear, because it is hardly to be assumed that there would be an allegation of more than two thousand dollars involved, followed by an allegation of one of thirteen hundred dollars. This case differs from those cited by counsel, and from the principle upon which they rely, in that there is here combined the value of the property and the amount of the damages. If no damages whatever had been alleged, and the complaint had been the statement that the amount involved exceeded two thousand dollars, and had asked for a judgment entitling the plaintiff to the possession of the real estate, but one conclusion could be drawn, that the real estate involved in the controversy exceeded in value the sum of two thousand dollars. The coupling of allegations of damage with the allegation of the amount in dispute, when it remains that in addition to these damages the property itself is involved, certainly does not reduce the amount, alleged to be in excess of two thousand dollars, down to the thirteen hundred dollars of damages;

these damages being but an incident to the recovery. It is not correct to say that because the real estate involved is mining land, the only value consists in the mineral contained in the ground; because, under the grant of the federal statutes, the full benefit of which is sought in an application for a patent, the claimant has the surface and all mineral therein contained, and the right to follow upon their dip veins having their apices therein, provided the claim is located and maintained in conformity with the requirements of the federal statutes and those authorized to be passed by the state in consonance. It seems impossible to contend, with any degree of plausibility, that where the whole litigation is waged for the purpose of determining who shall have the absolute title to property, the title to the property and the entire value which follows that title is not involved in the dispute and its value is not the amount which is involved.

III.

It is asserted several times in the brief of the defendant in error that whether or not an adverse suit is cognizable in the federal courts is in controversy between the Eighth and Ninth United States Judicial Circuits. We beg to dissent most positively from this assertion. Aside from the decision of Judge Hallett there has been no decision upon this subject in the Eighth Circuit, so far as we are advised, contrary to the position for which we contend, and certainly, up to the time of the dismissal of this case by Judge Hallett, no such de-

cision had been published within the Eighth Circuit. On the contrary, Justice Miller, sitting upon the Circuit, and later Justice Brewer, then Circuit Judge, announced the views for which we contend. Counsel have not cited us to a dicision in the Eighth Circuit other than Judge Hallett's, supporting the position they take, and we think it is safe to affirm, in view of the diligence and industry displayed by counsel in the preparation of their brief, that this failure to make citation is due to their non-existence. We hardly think counsel have dealt seriously with this matter, when they present a thrilling appeal on behalf of the poor mine owner litigant, as a reason why a federal court should not have jurisdiction of a litigation wherein there is to be determined, not merely the rights of the litigants upon the record, but of the United States as well. As a refutation of the sweeping assertion that federal jurisdiction would place an unjust power in the hands of wealthy litigants by means whereof they might drag the poor opponent away from his home to a populous city, there to be dealt with by an agrarian jury, swayed by the bold assertions of conscienceless experts, whereas, if the litigation should be conducted in the mining camp, the poor litigant, always in the right it would seem from the assertions of this brief, could and would present so strong a case that these same audacious experts would be powerless to persuade or influence the wise and experienced miners who would there compose the jury, we call attention to the fact that the framers of this law did not anticipate this oppressive feature of the statute, or else they would

have provided that the federal courts should have jurisdiction when the poor litigant selected that tribunal, or else only when the wealthy litigant was pursuing an equally wealthy one. It so happens that Colorado, whose area is so eloquently pictured by counsel, is not only wide in extent, and wealthy in mineral, and possessed of a varied population, but also has several places whereat the federal court sits to pass upon mining and other litigation as well. It also happens, as would have been observed prior to the recent creation of the County of Teller, that it was about as expensive and difficult to reach the county seat of El Paso County from the situation of the mines in question, as it was to reach Denver or Pueblo, at which the Federal court also sits, and that at Colorado Springs all the perils of a populous city, and all the disadvantages of a farmer jury would have been encountered. It is difficult to treat seriously these suggestions, and it is equally difficult to conceive that they have been seriously presented. The absurdity of this argument is intensified by a consideration of the wealth of the two defendants in this case and their probable influence where the mines are situated, as contrasted with the individual plaintiff.

We pass, without further discussion, the suggestion of the brief that a fair construction of this statute should be rejected because some wealthy litigant might sue a poor one in the federal court and away from the immediate location of the mines.

While some authorities are cited to the effect that the mere fact that mining properties are involved in litigation does not confer jurisdiction

upon the federal courts, none have been cited to the effect that in adverse suits federal courts should not have jurisdiction. The distinction between the two classes of litigation is striking. It might well be that a litigation would be waged with reference to the title to a mine when the federal laws and their construction would not be involved. For instance, there might be a suit to specifically enforce a contract for the sale of a mine, there might be an ejectment suit to recover possession, and in each case the character of a contract or deed might give rise to the litigation, in which none of the acts of location, nor the right of either parties to a patent, would be suggested or passed upon. It was after a full consideration of this distinction, and a wide experience in connection with this class of litigation, that Judge Sawyer announced the opinion, and sustained it by most cogent reasoning, which we cited in our opening brief. The statute originally passed, in which the words "court of competent jurisdiction" were implied, was prior to the act of 1881, in which certain requirements are made of the courts. We can see little force in the suggestion that because a state court might be a court of competent jurisdiction, *ergo* a federal court would not have jurisdiction.

In Inez Min. Co. v. Kinney (46 Fed. Rep., 832), cited by counsel for defendant in error, Judge Beatty, whose experience as a lawyer and a judge with mining adverse litigations is very extensive, points out the distinction to which we have called attention, and says, at page 34:

"Turning, now, to the pleadings, it will be found they constitute an action framed in pursuance of the statutes of Idaho for the quieting of the title to a piece of mining ground, which is no different in form from an action to quiet the title to any other land, the title to which depends upon some act of Congress. The laws of Congress are the basis of title to both mineral and agricultural lands, but that the title is involved is not alone sufficient to give a federal court jurisdiction. The question of jurisdiction in any such case is governed by the fact that such laws must or must not be construed in reaching a conclusion. The action based upon an adverse claim for patent to mining ground is an apparent exception to this rule, but jurisdiction in this action is not based alone upon a question of construction of the law. That action is especially contemplated by the statute; the government has instituted it as one of the means to the primary disposal of its dominion. To determine some questions, it substitutes a court for its land-office, and to some extent the government is interested that the just conclusion shall be reached."

The Court then proceeds to point out the difference between a suit to quiet title, when the property is a mining claim, and an adverse suit for the purpose of determining who shall receive title thereto from the government.

In the case of California Oil and Gas Co. v. Miller (96 Fed. Rep., 12), decided since we prepared our former brief herein, Judge Wellborn says:

"An action brought pursuant to sections 2325, 2326. Rev. St. U. S., where patent has been applied for, and adverse claim filed, is said to be an apparent exception to the rule above stated as to the essentials of a federal question. Mining Co. v. Kinney, *supra*. See also Rutter v. Mining Co., 75 Fed., 37; Mining Co. v. Rutter, 31 C. C. A., 223, 87 Fed., 801; Doe v. Mining Co., 43 Fed., 219; Bennett v. Harkrader, 158 U. S., 441, 15 Sup. Ct., 863; Chambers v. Harrington, 111 U. S., 350, 4 Sup. Ct., 428; Perego v. Dodge, 163 U. S., 160, 16 Sup. Ct., 971; 2 Lindl. Mines, Sec. 748. These cases are, perhaps, sustainable on either of the following theories: First, that the suit referred to in said action is but one step in a purely statu-

tory procedure, which has its inception, not in the court in which the suit is brought, but in the land office. Doe v. Mining Co., *supra*. Second, said section 2326, Rev. St., provides, among other things, that 'it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.' It can not be supposed that congress would subject the adverse claimant to forfeiture of his interest by reason of failure to institute suit, without providing a tribunal in which such claimant could sue as a matter of right. Now, since congress is powerless to confer jurisdiction on a state court, the presumption is a fair, if not necessary one, that said statute confers jurisdiction on federal courts."

While not an adverse case, the doctrine for which we contend, is also sustained by the case of Cates v. Producers' and Consumers' Oil Co. (96 Fed. Rep., p. 7).

Counsel, while claiming to have criticised, distinguished and overturned the cases explicitly in point which we have cited, failed to notice our comment upon the decision of this Court in Campbell v. Ellet (167 U. S., 166).

It is difficult to answer an argument which assumes that the many learned and experienced judges whose opinions we have relied upon were incapable of reading and comprehending the decisions which they have cited. We shall submit to this Court, without entering into a detailed discussion thereof, whether or not Judges Sawyer, Beatty, Hawley, Ross, and Justices Brewer and Miller, having the specific point under investigation, examining the authorities after argument, grasped the meaning of the cases quoted and relied upon

by them in the determination of this important question.

After all has been presented and said which could or should have been urged, it remains that the contemporaneous construction of these statutes, and especially by the judges who have applied and administered them, has been to hold with Justice Miller that necessarily these actions have arisen under the federal statutes, and, as a matter of course, the federal jurisdiction existed. Analyze, for a moment, section 2326 of the Revised Statutes of the United States, and it will be found that upon the judgment roll alone the successful party in this adverse litigation is authorized to proceed to the land department and there obtain a patent, upon filing therewith the surveyor's certificate of improvements and the description required in other cases. By this judgment many of the matters which, without the adverse were required to be proved to and passed upon by the land office, are determined conclusively by this adjudication. This judgment advises the land department authoritatively, and authorizes it to proceed upon that determination; that the adverse claimant is a citizen of the United States; that he has made due and proper discovery and location of his lode mining claim, in accordance with the requirements of the federal statutes; has maintained his possession, and made the expenditures required thereon by the federal statutes; that his location and possession were founded upon a primary valid discovery, upon unoccupied public mineral domain. That is to say, all these things are

required to be established, and are matters of paramount and vital importance, and yet, a decision in the adverse case establishes them, because the government has utilized the court for this purpose, in the administration of its interior department, and in the disposition of its public lands. It follows, necessarily, that when the court has thus been substituted by federal legislation for the United States land department, in determining these essential matters, that every adverse case involves, as between the applicant for a patent and the adverse claimant and litigant, all of these elements and requirements of the federal statute, to such an extent as to make the case one arising solely under the laws of the United States, and therefore one of concurrent federal jurisdiction. Section 2326, especially in connection with the amendment of 1881, which we have cited in the original brief, confers upon the court wherein the adverse litigation is carried on exclusive and conclusive jurisdiction to hear and determine a controversy as to all these matters and as to a compliance, upon these points, with the requirements of the federal mining statutes.

A reading of the case cited in our original brief, and some cited in the brief of the defendant in error, will disclose that adverse suits have repeatedly been taken to the Supreme Court of the United States for adjudication, on writs of error, from the highest state courts, because they involved a right asserted under the laws of the United States, which had been denied by the judgment below, without question being raised as to

the jurisdiction of this Court to hear and determine the same, because the suit was inherently, essentially and necessarily one arising under and involving the construction of federal statutes. We refer, among others, to the important case of Richmond Mining Co. v. Rose (114 U. S., 576).

In addition to the express decision and tacit recognition of federal jurisdiction in adverse suits, we find that the statute has been thus construed by the interior department, familiar with the questions involved and constantly called upon to consider, construe and apply the mining statutes. This appears from the Mining Circular, issued from the General Land Office, with the approval of the Secretary of the Interior, and which has for years included this clause:

> "Where an adverse suit has been filed but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the state court having jurisdiction in the case, and also by the clerk of the Circut Court of the United States, for the district in which the claim is situated, will be required."
>
> Paragraph 90, Mining Circular, approved June 24, 1899,

which is a repetition of the same clause, in circulars of previous dates.

All of which we respectfully submit.

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